

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of	)	
	)	
Telecommunications Relay Services	)	CC Docket No. 98-67
And Speech-to-Speech Services for	)	
Individuals with Hearing and Speech	)	
Disabilities	)	

To: The Commission

**PETITION FOR EMERGENCY STAY OF THE  
NATIONAL VIDEO RELAY SERVICE COALITION**

Pursuant to sections 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a) of the Commission's Rules,<sup>1</sup> the National Video Relay Service Coalition (the "Coalition")<sup>2</sup> hereby requests that the Commission stay the Order of the Chief, Consumer & Government Affairs Bureau (the "Bureau"), DA 04-1999, released June 30, 2004 ("*Bureau 2004 Reimbursement Order*"), pending action on the Coalition's Application for Review of the Bureau's Order. The Coalition is simultaneously filing an Application for Review of the Bureau's decision decreasing the interim reimbursement rate for Video Relay Service ("VRS") to \$7.293 per minute commencing July 1, 2004. The Coalition is seeking a return to the \$8.854 per minute interim rate set by the

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<sup>1</sup> 47 C.F.R. §§ 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a).

<sup>2</sup> The members of the Coalition include Telecommunications for the Deaf, Inc. ("TDI"), Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN"), National Association of the Deaf ("NAD"), and The Association for Late Deafened Adults ("ALDA"), the American Association of People with Disabilities ("AAPD"), Deaf and Hard of Hearing in Government ("DHHIG"), the California Coalition of Agencies Serving the Deaf and Hard of Hearing ("CCASDHH"), the Student Body Government ("SBG") of Gallaudet University, and the Registry of Interpreters for the Deaf, Inc. ("RID").

Commission on June 10, 2004.<sup>3</sup> The deterioration in availability and quality of VRS experienced by the constituents of the member organizations of the Coalition resulting from the decrease in the interim VRS reimbursement rate is causing immediate, irreparable harm to the Coalition, its member organizations and their constituents.

## **I. ARGUMENT**

It is well settled by the United States Court of Appeals for the D.C. Circuit that “[a]n order maintaining the *status quo* is appropriate when a serious legal question is presented, when little harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.”<sup>4</sup> This standard requires the Commission to examine “whether: (1) petitioners are likely to succeed on the merits; (2) petitioners will suffer irreparable injury absent a stay; (3) a stay would substantially harm other interested parties; and (4) a stay would serve the public interest.”<sup>5</sup> Courts have considered these factors to be elements of a “sliding scale,” such that when “the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas” are less compelling.<sup>6</sup> This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending Commission review of the *Bureau 2004 Reimbursement Order*. Indeed, the Commission has in the past indicated that a stay maintaining the *status quo* should be granted “when a serious legal

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<sup>3</sup> *Telecommunications Relay Services*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Docket No. 90-571 *et al.*, FCC 04-137, released June 30, 2004 (“2004 TRS Report & Order”). The interim rate was set retroactively to September 1, 2003.

<sup>4</sup> *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); see also *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>5</sup> *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Holiday Tours, Inc.*, 559 F.2d at 843.

<sup>6</sup> *See Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998).

question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm.”<sup>7</sup>

**A. The Coalition will Succeed on the Merits.**

The analysis as to whether to issue a stay begins with an evaluation of the likelihood of petitioner success on the merits. However, because the four factors originally established in *Virginia Petroleum Jobbers* are applied on a sliding scale, there is no rigid requirement that petitioners demonstrate “a mathematical probability of success.”<sup>8</sup> In this case, the Coalition will succeed on the merits because, as explained in the Coalition’s Application for Review, the *Bureau 2004 Reimbursement Order* reducing the VRS interim reimbursement rate set only 20 days earlier by the Commission violated Section 225 of the Communications Act of 1934, as amended (the “Act”).<sup>9</sup>

Title IV of the Americans with Disabilities Act of 1990 (“ADA”)<sup>10</sup> addresses access to telecommunications by deaf and hard of hearing persons. Section 401 of Title IV, which was codified in Section 225 of the Act,<sup>11</sup> requires that Telephone Relay Service (“TRS”) be offered. It states in part:

The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with Section 7(a) of this Act, the use of existing technology and do not discourage or impair the development of improved technology.<sup>12</sup>

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<sup>7</sup> *Florida Public Serv. Comm’n*, 11 FCC Rcd 14324, 14325-26 & n. 11 (1996).

<sup>8</sup> *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d at 844.

<sup>9</sup> 47 U.S.C. § 225.

<sup>10</sup> PL 101-336, July 26, 1990.

<sup>11</sup> 47 U.S.C. § 225.

<sup>12</sup> 47 U.S.C. § 225(d)(2).

In other words, the ADA not only requires the Commission to “encourage . . . the use of existing technology,” but equally important, the Commission may not “discourage or impair the development of improved technology.”<sup>13</sup> Because VRS is a relatively new technology that provides a form of TRS that is closer to functional equivalency than traditional TRS, Section 225 of the Act prohibits the Commission from discouraging or impairing the development of VRS, notwithstanding the fact that VRS is not a mandated service at this time.

In setting the VRS reimbursement rate, the Bureau considered the \$7.293 per minute rate proposed by the National Exchange Carrier Association (“NECA”). Without taking into account the adverse impact that a further VRS rate reduction would have on the deaf and hard of hearing communities, the Bureau determined that NECA properly applied the formula established by the Bureau in 2003<sup>14</sup> as ratified by the Commission in the *2004 TRS Report & Order*. The Bureau did find that NECA failed to include an 11.25% rate of return on investment as required in the *2004 TRS Report & Order* and did recognize that carriers may seek review of certain disallowances. Thus, the Bureau’s decision regarding the \$7.293 per minute VRS reimbursement rate is subject to “any supplemental cost data relating to investment and possible review of specific disallowances.”<sup>15</sup>

As mentioned, the Bureau did not consider the adverse impact that a rate reduction from \$8.854 per minute to \$7.293 per minute would have on the deaf and hard of hearing population. Instead, the Bureau hid behind a mechanical application of the formula established a year earlier and ratified by the Commission. The Bureau approved the NECA proposal notwithstanding the

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<sup>13</sup> *Id.* See also *2004 TRS Report & Order* at para. 4.

<sup>14</sup> *Telecommunications Relay Services*, Order, CC Docket 98-67, DA 03-2111, released June 30, 2003 (“*Bureau 2003 Reimbursement Order*”).

<sup>15</sup> *Bureau 2004 Reimbursement Order* at para. 50.

fact that the proposal was flawed even under the adopted formula because rate of return was not calculated based upon actual investment data and certain disallowances were still subject to review. Equally important, because the NECA collection of cost data from the VRS vendors was based upon the Commission's improperly restrictive guidelines, the VRS vendors may not have submitted cost information on research and development, recruitment and training of interpreters, and financial management activities such as annual audits. As discussed in the Coalition's Application for Review, notwithstanding the *2004 TRS Report & Order*, failure on the part of NECA and the Bureau to include these reasonable and prudent costs was a violation of Section 225(d)(2) of the Act, because failure to fully reimburse VRS vendors for their costs does not encourage the use of existing technology and discourages the development of improved technology.<sup>16</sup>

**B. The Coalition Members and their Constituents, will Experience Irreparable Injury.**

In applying the irreparable injury prong of the test for granting a stay petition, the Commission must find that the "injury is certain and great; it must be actual and not theoretical."<sup>17</sup> Further, the injury must be imminent such that "there is a clear and present need for equitable relief."<sup>18</sup>

The Coalition members and their constituents will be harmed because they rely on the provision of VRS services. As explained in the Coalition's Application for Review, VRS better enables individuals who are deaf or hard of hearing to communicate with hearing individuals who are family, friends, employers, co-workers and others. Unlike traditional TTY, TRS and

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<sup>16</sup> See 47 U.S.C. § 225(d)(2).

<sup>17</sup> *Wisconsin Gas v. FERC*, 758 F. 2d 669, 674 (DC Cir. 1985).

<sup>18</sup> *Id.*

Internet Protocol TRS, VRS provides individuals who are deaf or hard of hearing and their hearing contacts with the ability to communicate in near real-time with greater accuracy. Reasonable VRS provider compensation rates are essential to reinstate the continued viability of this critical service.

Since last year's rate reduction for VRS, the Coalition members and their constituents have experienced a severe reduction in the quality and availability of service. These reductions have already had detrimental effects on the consumers and businesses that rely on this service. In particular, the reductions have curtailed the ability of individuals who are deaf or hard of hearing and their contacts to take advantage of the opportunities and benefits afforded by equal access to the telecommunications revolution. A further reduction in these rates will only exacerbate this problem. Therefore, failure to stay the *Bureau 2004 Reimbursement Order* will result in a certain and great injury to the Coalition's members and their constituents.

Not only is this injury certain and great, but it is imminent in the most immediate sense of the word. It is occurring now. The *Bureau 2004 Reimbursement Order* took effect on July 1, 2004, only one day after the Order was issued. The injury is irreparable because nothing can compensate for the lost opportunity resulting from telephone conversations that were unable to take place as a result of the reduction of quality and availability of VRS. It is therefore clear that the change in the interim reimbursement rate and the resulting injury satisfy a clear and present need for equitable relief.

**C. A Stay Would Not Substantially Harm Other Interested Parties**

The Commission should grant the requested stay because "little if any harm will befall other interested persons."<sup>19</sup> In particular, because the TRS fund contribution rate continues to be

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<sup>19</sup> *Holiday Tours* at 844.

relatively small, the change in the reimbursement rate for VRS will have a negligible effect on TRS fund contributions that the public must pay in their phone bills. In other words, individual members of the general public will experience no financial burdens because of the change in the reimbursement rate resulting from a return to the VRS interim reimbursement rate set in the *2004 TRS Report & Order*.

On the other hand, the general public would experience harm if the interim VRS reimbursement rate as set by the *Bureau 2004 Reimbursement Order* remains in effect. VRS, like other forms of TRS, benefits the hearing population because they use VRS to speak with people who are deaf or hard of hearing. A non-compensatory VRS reimbursement rate will result in it becoming more difficult for the hearing population to have real-time phone conversations with the deaf and hard of hearing communities. Therefore, in addition to a stay not substantially harming other interested parties, a stay is likely to benefit other parties because it will likely result in better communication opportunities between people who can hear and people who are deaf or hard of hearing.

#### **D. The Equities and the Public Interest Favor a Stay**

For the final prong of the test for granting a stay petition, the Commission must consider the equities and the public interest. In this regard, Congress provided guidance when it adopted the ADA. Specifically, Congress mandated that the Commission encourage the use of existing technology and not discourage the development of improved technology.<sup>20</sup> As discussed earlier as well as in the Coalition's Application for Review, the Bureau's reduction in the interim VRS reimbursement rate is likely to result in a reduction in the quality and availability of VRS. There could be no clearer violation of Section 225 of the Act. Because the Coalition is likely to prevail

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<sup>20</sup> 47 U.S.C. § 225(d)(2).

on the merits, the members of the deaf and hard of hearing communities are likely to suffer significant, immediate and irreparable injury if a stay is not granted. There will be no financial burdens imposed on individual telephone users if a stay is granted. The hearing population will benefit from a stay because the hearing population benefits from the opportunity to use VRS to speak with the deaf and hard of hearing communities. Therefore, the equities favor a grant of a stay by the Commission. Since all factors, including consideration of the public policy set by Congress in the ADA favor a stay, a grant of a stay would serve the public interest.

## **II. CONCLUSION**

For these reasons discussed herein, the Commission should stay the effectiveness of the *Bureau 2004 Reimbursement Order* and reinstate the interim VRS reimbursement rate adopted by the Commission in the *2004 TRS Report and Order* pending Commission action on the Coalition's Application for Review.

Respectfully submitted,

/s/

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